

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/SB 2560

INTRODUCER: Criminal Justice Committee and Senators Aronberg and Sobel

SUBJECT: Offense of Sexting

DATE: April 12, 2010

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Clodfelter	Cannon	CJ	Fav/CS
2.	Daniell	Maclure	JU	Favorable
3.			JA	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|--|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="checked" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

The bill creates a new offense that applies to minors who engage in “sexting,” beginning with a noncriminal violation for the first offense and escalating with subsequent offenses. Currently, acts that are covered by the bill could be prosecuted as a felony and result in the minor having to register as a sexual offender and be subject to residency restriction laws.

This bill creates an unnumbered section of the Florida Statutes.

II. Present Situation:

Florida Laws that Apply to Sexual Material Depicting Minors

Florida law currently contains various statutes that prohibit the creation, possession, and transmission of sexual materials depicting minors. Some of these laws address photographs or videos that do not rise to the level of child pornography, which is statutorily defined as “any

image depicting a minor engaged in sexual conduct.”¹ Section 847.001(16), F.S., defines “sexual conduct” as:

[A]ctual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. A mother’s breastfeeding of her baby does not under any circumstance constitute “sexual conduct.”²

The following is a summary of Florida laws that proscribe possession and transmission of sexual materials that depict minors.

Sexual Performance by a Child

Section 827.071(5), F.S., makes it a third-degree felony for any person to knowingly possess a photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, he or she knows to include any sexual conduct by a child. The statute specifies that each photograph, motion picture, exhibition, show, representation, or presentation is a separate offense.

Prohibition of Acts Relating to Obscene and Lewd Materials

Section 847.011(1)(a), F.S., makes it a first-degree misdemeanor for a person to knowingly sell, lend, give away, distribute, transmit, show, or transmute, or have in his or her possession, custody, or control with intent to sell, lend, give away, distribute, transmit, show, or transmute, specified obscene items, including pictures, photographs, and images. It is a third-degree felony if the obscene item used depicts a minor³ engaged in any act or conduct that is harmful to minors.⁴

Section 847.011(2), F.S., makes it a second-degree misdemeanor for a person to have in his or her possession, custody, or control specified obscene items, including pictures, photographs, and images, without the intent to sell such items.

¹ See ss. 775.0847 and 847.001, F.S.

² “Sexual conduct” is defined identically in ss. 775.0847 and 827.071, F.S. It has a more limited definition in s. 365.161, F.S., which relates to obscene or indecent communications made by a telephone that describe certain sexual acts.

³ The term “minor” is defined as “any person under the age of 18 years.” Section 847.001(8), F.S.

⁴ The term “harmful to minors” is defined in s. 847.001(6), F.S. For a more detailed definition, see the Effect of Proposed Changes section of this bill analysis.

Protection of Minors

Section 847.0133, F.S., makes it a third-degree felony for a person to knowingly sell, rent, loan, give away, distribute, transmit, or show any obscene⁵ material to a minor. “Material” includes pictures, photographs, and images.

Computer Pornography

It is a third-degree felony for a person to:

- Knowingly compile, enter into, or transmit the visual depiction of sexual conduct with a minor by use of computer;
- Make, print, publish, or reproduce by other computerized means the visual depiction of sexual conduct with a minor;
- Knowingly cause or allow to be entered into or transmitted by use of computer the visual depiction of sexual conduct with a minor; or
- Buy, sell, receive, exchange, or disseminate the visual depiction of sexual conduct with a minor.⁶

Transmission of Pornography

Section 847.0137(2), F.S., specifies that any person who knew or reasonably should have known that he or she was transmitting child pornography to another person commits a third-degree felony. To be child pornography, the image must depict a minor engaging in sexual conduct. The penalty for a violation of this statute is greater if the material is transmitted to a minor.

Transmission of Material Harmful to Minors

Section 847.0138, F.S., specifies that any person who knew or believed that he or she was transmitting an image, information, or data that is harmful to minors to a specific individual known by the defendant to be a minor commits a third-degree felony. This section only applies when the material is transmitted to a minor.

Both minors and adults can be charged with any of the offenses described above.

Sexting

“Sexting” is a recently coined term that combines the words “sex” and “texting.”⁷ It is used to describe the act of sending sexually explicit messages, photographs, or videos of oneself by electronic means. As the name suggests, “sext” messages are most commonly sent by a cell

⁵ Section 847.001(10), F.S., defines the term “obscene” as the status of material which the average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest; depicts or describes, in a patently offensive way, sexual conduct as specifically defined herein; and taken as a whole, lacks serious literary, artistic, political, or scientific value. A mother’s breastfeeding of her baby is not under any circumstance “obscene.”

⁶ Section 847.0135(2), F.S.

⁷ See Stacey Garfinkle, *Sex + Texting = Sexting*, THE WASHINGTON POST, Dec. 10, 2008, available at <http://voices.washingtonpost.com/parenting/2008/12/sexting.html> (last visited Apr. 11, 2010).

phone text message. Media reports and other studies indicate that sexting is a growing trend among teenagers. In a 2008 survey of 1,280 teenagers and young adults of both sexes, 20 percent of teens (ages 13-19) and 33 percent of young adults (ages 20-26) had sent nude or semi-nude photographs of themselves electronically.⁸ Additionally, 39 percent of teens and 59 percent of young adults had sent sexually explicit text messages.⁹

There is no Florida law that specifically addresses sexting. Under current law, a person who sexts another, or a person who receives an image that is the result of sexting, could be charged with any number of different offenses that relate to sexual material depicting minors. For example, in 2007, 18-year-old Phillip Alpert was arrested and charged with transmitting child pornography (among other things) after he sent a nude photo of his 16-year-old girlfriend to her friends and family after they had an argument. In total, Alpert was charged with 72 offenses, sentenced to five years probation, and was required to register as a sex offender.¹⁰

Similarly, in other jurisdictions, some law enforcement officers and district attorneys have begun prosecuting teens who “sext” under laws generally reserved for producers and distributors of child pornography. For example, in Pennsylvania, the district attorney gave 17 students who were either pictured in images or found with “provocative” images on their cell phones the option of either being prosecuted under child pornography laws or agreeing to participate in a five-week after school program and probation.¹¹ Similar incidents have occurred in Massachusetts, Ohio, and Iowa.¹²

As a result, state legislatures have considered making laws that downgrade the charges for sexting from felonies to misdemeanors. In 2009, Vermont and Utah passed laws that downgraded the penalties for minors and first-time perpetrators of sexting.¹³

III. Effect of Proposed Changes:

This bill creates a new offense that applies to “sexting” by a minor. A minor who commits sexting is subject to penalties that are less than the punishment that could be assessed for the same conduct under existing law. Also, a conviction of sexting would not result in the requirement to register as a sexual offender or to comply with existing residency restriction laws or other laws that apply to persons who are convicted of certain sexual offenses.

⁸ Nat’l Campaign to Prevent Teen and Unplanned Pregnancy, *Sex and Tech: Results from a Survey of Teens and Young Adults*, 1, available at http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf (last visited Apr. 11, 2010).

⁹ *Id.*

¹⁰ See Vicki Mabrey and David Perozzi, ‘Sexting’: Should Child Pornography Laws Apply?, ABC NEWS (Apr. 1, 2010), available at <http://abcnews.go.com/Nightline/phillip-alpert-sexting-teen-child-porn/story?id=10252790> (last visited Apr. 11, 2010); Deborah Feyerick and Sheila Steffen, ‘Sexting’ lands teen on sex offender list, CNN (Apr. 8, 2009), available at <http://www.cnn.com/2009/CRIME/04/07/sexting.busts/index.html> (last visited Apr. 11, 2010).

¹¹ Amanda Lenhart, *Teens and Sexting: How and why minor teens are sending sexually suggestive nude or nearly nude images via text messaging*, Pew Research Ctr., 3 (Dec. 15, 2009), available at http://www.pewinternet.org/~media/Files/Reports/2009/PIP_Teens_and_Sexting.pdf (last visited Apr. 11, 2010).

¹² *Id.*; see also Mabrey and Perozzi, *supra* note 10.

¹³ Lenhart, *supra* note 11, at 3.

Sexting occurs when a minor knowingly uses a computer, or any other device capable of electronic data transmission or distribution, to transmit or distribute to another minor any photograph or video of himself or herself which depicts nudity and is harmful to minors.

The term “nudity” is defined in current law to mean:

[T]he showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering; or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple; or the depiction of covered male genitals in a discernibly turgid state. A mother’s breastfeeding of her baby does not under any circumstance constitute “nudity,” irrespective of whether or not the nipple is covered during or incidental to feeding.¹⁴

Section 847.001(6), F.S., defines “harmful to minors” as:

[A]ny reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it:

- (a) Predominantly appeals to a prurient, shameful, or morbid interest;
- (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material or conduct for minors; and
- (c) Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.

A mother’s breastfeeding of her baby is not under any circumstance “harmful to minors.”

The bill provides the following graduated punishment schedule for a violation of sexting:

- A first offense is a noncriminal violation, punishable by eight hours of community service or a \$60 fine. The court may also order participation in suitable training or instruction¹⁵ instead of, or in addition to, the community service or fine.
- An offense that occurs after the minor is found to have committed a noncriminal violation for sexting is a second-degree misdemeanor. A second degree misdemeanor is punishable by a jail term of no more than 60 days and a fine of no more than \$500.¹⁶ The term “found to have committed” would include cases in which the minor is found guilty or adjudicated delinquent, regardless of whether adjudication is withheld.
- An offense that occurs after the minor is found to have committed a second-degree misdemeanor for sexting is a first-degree misdemeanor. A first degree misdemeanor is punishable by a jail term of no more than one year and a fine of no more than \$1,000.¹⁷

¹⁴ Section 847.001(9), F.S.

¹⁵ The bill does not define “suitable training or instruction,” and it is unclear what type of training or instruction is anticipated under the bill.

¹⁶ See ss. 775.082 and 775.083, F.S.

¹⁷ *Id.*

- An offense that occurs after the minor is found to have committed a first-degree misdemeanor for sexting is an unranked third-degree felony. A third-degree felony is punishable by imprisonment for no more than five years and a fine of no more than \$5,000.¹⁸ However, because the felony is unranked, the offender may commonly be sentenced to a term of probation under supervision by the Department of Corrections.

According to the Florida Department of Law Enforcement (FDLE), because the first offense is a noncriminal violation, the minor will not have an FDLE record. Therefore, if the offenses occur in different jurisdictions, prosecutors may be unaware of a previous noncriminal violation, and the minor may not be charged with the proper offense.¹⁹

Under the bill, the offense of sexting, and its reduced penalties, does not include the conduct of a minor who re-transmits a sexted photograph or video. Accordingly, the state attorney would continue to have discretion in the prosecution of such conduct.

The bill specifies that the sexting provisions do not prohibit the prosecution of a minor for conduct relating to material that includes the depiction of sexual conduct or sexual excitement, and does not prohibit the prosecution of a minor for stalking under s. 784.048, F.S.

The bill provides that it will take effect October 1, 2010.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Minors who commit the offense of sexting may be subject to fines ranging from \$60 to \$5,000 depending on the number of times the minor has committed the offense.

¹⁸ See ss. 775.082, 775.083, and 775.084, F.S.

¹⁹ Florida Dep't of Law Enforcement, *Senate Bill 2560 Relating to Sexting* (Mar. 17, 2010) (on file with the Senate Committee on Judiciary).

C. Government Sector Impact:

The Criminal Justice Impact Conference, which provides the final, official estimate of the prison bed impact of criminal legislation, has not yet met to consider the impact of this bill. The bill creates new misdemeanor offenses, which could affect local jails; however, the exact impact is unknown at this time.

The bill may have some positive fiscal impact to the state by subjecting minors who commit the offense of sexting to fines ranging from \$60 to \$5,000, depending on the number of times the minor has committed the offense; however, the exact fiscal impact is unknown at this time.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by the Criminal Justice on April 7, 2010:

The committee substitute:

- Provides that the new offense only applies to a minor sending a picture to a minor and removes possession of a sexted message by a minor from the new offense.
- Changes the punishment for a noncriminal violation for sexting to include either eight hours of community service or a \$60 fine, and a suitable program of training in lieu of or in addition to either the community service or fine.
- Relates the escalation of punishment to a finding that the offender committed the most recent offense, rather than to a specified time period. It also changes the term “conviction” to “found to have committed” to include withheld adjudications and findings of delinquency for purposes of escalation of punishment.

B. Amendments:

None.